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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,

Petitioner

v.

RALPH FORBES,

Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the government, through its public television station, may hold a debate and exclude a qualified balloted candidate it disfavors.

LIST OF PARTIES

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In 1992, Congressman John Hammerschmidt announced his retirement from Congress as representative of the Third Congressional District of Arkansas. For his vacancy, the Republican Party nominated Tim Hutchinson and the Democratic Party nominated John Van Winkel. Obtaining enough signatures under State law and approved by the Secretary of State, Mr. Ralph Forbes qualified as the third and last candidate.[1] Before his qualification, the Arkansas Educational

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[1] Mr. Forbes had also obtained a plurality of votes in earlier various state-wide elections.

Television Network ("AETN"), a media chain created, owned, and operated by the State of Arkansas, decided to sponsor and televise a series of Congressional Debates. These debates included the Congressional race for the Third District. AETN refused Mr. Forbes permission to participate in the debate. He was the only qualified candidate for this race so refused. On the night of the debate, Mr. Forbes traveled to the physical location of the debate and was confronted by Mr. Oscar Eugene Goss of AETN. Mr. Goss not only prevented Mr. Forbes from entering the studio, but also attempted to dissuade the assembled news media from interviewing Mr. Forbes. (R. 128-129.) The debate took place without Mr. Forbes.

Mr. Forbes filed the instant suit. The United States District Court for the Western District of Arkansas, Fort Smith Division, ultimately ruled that the debates did not constitute a limited public forum. The Eight Circuit Court of Appeals overruled and held the government petitioner's actions were in violation of the First Amendment of the United States Constitution. Government petitioner AETN now petitions for Writ of Certiorari to this Court.

SUMMARY OF ARGUMENT

Government petitioner intentionally opened a limited public forum for a debate for the Third Congressional District of Arkansas. It opened government facilities to outsiders to engage in free expression concerning the office in question. The Eighth Circuit Court of Appeals correctly determined that the government's exclusion of the only other qualified candidate from the limited public forum for no compelling governmental reason violated the First Amendment. This holding is consistent with this Court's decisions and public forum analysis.

Petitioner's fear of opening access for "viewers" to contest programming decisions is misplaced. "Viewer" rights are inapposite to the case at bar. The instant case simply involves the

issue of whether the government may hold a debate and then exclude a balloted candidate it disfavors.

The decision to sponsor a debate was made solely by petitioner. Once decided, Mr. Forbes, a balloted Independent candidate, came under the umbrella of protection within the state-created forum. His exclusion violated not only the First Amendment but the purpose of public television itself. Candidates for U.S. office should expect equal access and equal treatment by the government. Any other approach would be dangerous to a free society.

REASONS FOR DENYING THE WRIT

This Court has stated:

> The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance.

Martin v. City of Struthers, 319 U.S. 141, 143 (1943). Petitioner's approach seeks instead for the government to sponsor debates for the United States Congress and then exclude those candidates it disfavors or feels are not "newsworthy." The government does not have such power over the election choices of its citizens. As the Eight Circuit held: "[w]hether [Mr. Forbes] was viable was, ultimately, a judgment to be made by the people of the Third Congressional District, not by officials of the government in charge of channels of communication." *Forbes v. AETN*, 93 F.3d 497, 504-5 (8th Cir. 1996). Absent a compelling governmental interest, then, Mr. Forbes should not have been excluded by the government.

I. THE AETN THIRD CONGRESSIONAL DISTRICT DEBATE WAS A LIMITED PUBLIC FORUM CONSISTENT WITH THIS COURT'S DECISIONS AND NOT INCONSISTENT WITH THE ELEVENTH CIRCUIT.

Petitioner contends the debate was not a limited public forum under this Court's decisions, especially *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788 (1985). The three types of forums delineated by this Court are the traditional public forum, the limited public forum, and the non-public forum. *Perry Education Association v. Perry Local Educator's Association*, 460 U.S. 37, 44 (1983). A limited public forum is a place of communication not generally open for public expression, but is an open forum because the government has opened it for a limited period of time or purpose. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981). The debate in question was clearly a limited public forum and not a non-public forum.

Petitioner correctly quotes *Cornelius* on this issue:

> The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.

Cornelius, 473 U.S. at 802-3; Petition for Writ, p.p. 12-13. The intent and action of the government in this case could be no clearer. Government petitioner conceived, staged, and broadcast the debate in question. Under its own factual recitation, they intentionally opened up government property for outsiders to engage in free expression in the limited context of

a Congressional debate. It opened a forum. Its position that the debate is a non-public forum is untenable.

The government spends much time in its petition attempting to establish its intent to exclude Mr. Forbes. This fact Mr. Forbes does not dispute. The government's desire to exclude a candidate does not alter the reality, however, that it created a limited public forum for the congressional debate first. Once the topic or subject matter of the forum is specified, as it was in the instant case, one can easily determine the common area of speech and class of speakers. Government exclusion of a member of the class of speakers for this forum is subject to First Amendment scrutiny.

Petitioner in effect proposes that the government may open a forum on a subject and then tailor or gerrymander out particular individuals or groups it disfavors. This court has always rejected such an approach. For example, in *Widmar v. Vincent*, 454 U.S. 263 (1981), The University of Missouri at Kansas City opened its facilities and created a limited public forum for student groups. This Court found the government exclusion of one group meeting for religious purposes violated the First Amendment. Although the University was not required to create the limited public forum, and although it could distinguish between student and non-student groups, it could *not* selectively allow favored groups the benefits it denied unpopular groups. *Id.* Even in the shadows of real fears of violating the Establishment Clause, the University could not offer unequal treatment and benefits.

The government did not have to organize the instant congressional debate. Yet, it did. Having done so, it cannot then disfavor and exclude the only other qualified candidate without a compelling justification. Like the University in *Widmar*, once the government designates the forum, unequal treatment is constitutionally suspect. This is especially true in a case concerning the core Free Speech issues of a political

exchange of ideas by a candidate for the United States Congress.

Other than its framework for public forum analysis, *Cornelius* is not similar to the case at bar. In *Cornelius*, an advocacy group sought to be included in an annual solicitation of federal employees analogous to the United Way. This Court found the solicitation to be a non-public forum. This Court pointed out the federal work place exists to accomplish the business of the employer and was not a forum created for expression. *Cornelius*, 473 U.S. at 805. By contrast, AETN's congressional debate for the Third District was intended for the dissemination and exchange of ideas. This was its reason for existence. The Eight Circuit's holding that the debate in question was a limited public forum and not a non-public forum is correct and consistent with this Court's former holdings. Whether petitioner's approach was Mr. Forbes' viability as a candidate, "newsworthiness," or "legitimacy" in the government's eyes, is irrelevant; such standards are insufficient for government exclusion from a First Amendment forum. *See* Petition for Writ, p.p.14-15.

Petitioner also contends that a serious conflict exists between the Eighth Circuit's opinion and *Chandler v. Georgia Public Telecommunication Commission*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 112 S. Ct. 71 (1991), which would require this Court to now take up this issue. Although *Chandler* involves a debate in Georgia where a Libertarian candidate was excluded from public television such a conclusion is not warranted.

First, public forum determinations are mixed questions of fact and law. *Forbes*, 93 F.3d at 502. A determination by one court that a limited open public forum exists, and by another under a separate nucleus of facts that one does not, is insufficient for a conflict even if the facts are very similar. Second, *Chandler* involves a request to stop a television program entirely and thus involved "a decision to broadcast one program." 917 F.2d at 488. Unlike the Eight Circuit decision at bar, *Chandler* thus involved a decision on a request for prior restraint and an

emergency or quick resolution. *Id.* at 488. *Chandler*, in fact, rests most strongly not even on another court's opinion but upon a concurrence by Justice Rubin of the Fifth Circuit. *Id.* The case cited, *Muir v. Alabama Education Television Communication*, 688 F. 2d 1033 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983), actually only addresses the issue of whether individual "viewers" of public television stations can claim a First Amendment right to compel a program to be aired.[2]

Most importantly, *Chandler* is not useful in creating a strong conflict on public forum analysis. The case itself uses little, if any, forum analysis. This decision, in fact, never makes any specific statement as to which forum the debate is, although one could assume from the decision's result. While the court's succinct decision is understandable in light of the emergency decision placed before the Eleventh Circuit panel, it hardly provides a basis for a clear conflict between the circuits requiring this Court's intervention.

II. MAINTAINING FIRST AMENDMENT CONSTRAINTS ON GOVERNMENT EXCLUSION OF A QUALIFIED CANDIDATE FROM A GOVERNMENT SPONSORED CONGRESSIONAL DEBATE DOES NOT DESTROY DISCRETION OVER PROGRAMMING

Government petitioner brings forward its parade of horribles which it says will result if government exclusions of qualified candidates in their debates are subjected to First

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[2] Mr. Forbes suggests that some confusion as to the Eleventh Circuit's reasoning in arriving at it's holding in *Chandler* is understandable given the peculiar circumstances under which that opinion was rendered. The published opinion reveals that the district court issued its temporary injunction on October 18, 1990, briefs were submitted to the circuit court on an expedited schedule, the case was argued on October 30, 1990 and the appellate opinion was issued the next day. The Eleventh Circuit itself characterizes its written opinion as "succinct". *Chandler*, at 488.

Amendment constraints. Such fears are unwarranted. First, the Eight Circuit did not say the station or all its programs were public forums. It merely said AETN's designated political debates in question were limited public forums. Arguments regarding "viewer access" rights to question programming are thus inapposite. The Eighth Circuit's decision in no way extends First Amendment rights to viewers to question programming decisions. While such questions may arise in some future case, they are not implicated by the instant decision.

The instant case actually opens a much smaller door and creates less of a threat than the usual equal access case. Other forum cases would more likely provide the opportunity for the multitudes to enter the forum. In the instant situation, those seeking access would be very limited. In fact in the case at bar, Mr. Ralph Forbes would be the only one. Allowing such access to government debates by qualified candidates would hardly open the floodgates to the masses.

The unfettered discretion which the government seeks over programming is not supported by the case upon which it relies. The *Chandler* case provides little support for the boundless discretion the government seeks in all programming. It states that the use of government television stations "to suppress unwanted expressions in the marketplace of ideas would authorize judicial intervention." 917 F. 2d at 489. Such an approach would clearly invite First Amendment scrutiny of any programming decision by the government, an approach much more broad than the narrow decision set forth by the Eighth Circuit in the instant case. The instant issue is simply about government exclusion of candidates from government debates, not the rights of "viewers."

III. EVEN IF NO FORUM HAD EXISTED, THE ACTIONS OF GOVERNMENT PETITIONER WERE NOT REASONABLE

Not only was Mr. Forbes' viability as a candidate a matter to be determined by the people and not by government

officials in charge of the channels of communication, but those official actions taken were actually unreasonable. The supposed basis for the existence of governmental broadcasting is its inclusivity and presentation of excluded views. "If PBS does not do it, who will?" is the slogan of PBS. It is unreasonable under the government stations' purposes of inclusivity and presenting excluded views to exclude a qualified candidate from its debate because he or she is "marginal."

The necessity for public debate is perhaps most evident when impacting "the ability of the citizenry to make informed choices among candidates for office." *Kennedy for President Committee v. F.C.C.*, 636 F. 2d 417, 420 (D.C. Cir. 1980), (citing *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). The electorate is invigorated by hearing competing opinions, competing proposals to address weighty public concerns, and to otherwise be informed. In fact, it could be said that a First Amendment requirement of inclusion of a balloted candidate in a state-sponsored debate lies at the heart of the rationale for broadcast licensing of a state in the first place. While private broadcasters can include and exclude candidates at will, *state-owned* broadcasters exist to fill a broader, non-profit need, i.e., the need for public interest programming that cannot be otherwise obtained by the electorate. The State's exclusion of Mr. Forbes from its debate was, again, unreasonable in light of its distinguishing purpose for existence.

Additionally, the petitioner's decision that Mr. Forbes was not "newsworthy" was itself irrational. In elections, the change of a vote means both one candidate's gain and another's loss. A candidate who has received a plurality of votes in previous state-wide elections can win or lose an election for the other candidates. Mr. Forbes candidacy was thus certainly newsworthy, possibly affecting the outcome of the

election even if he did not win.[3] His exclusion because he was not newsworthy is thus insupportable.

For a state-owned broadcaster to unilaterally decide which candidates are "serious" or to entrench the political parties it chooses is itself dangerous and undermines the entire democratic process. This Court has consistently asserted its commitment to the principle that "debate on public issues should be uninhibited, robust, and wide open." *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 913 (1982); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Nowhere is this more crucial, as the Eighth Circuit appropriately stated, than "with political speech by legally qualified candidates... and the exclusion of one such speaker has the effect of a prior restraint -- it keeps his views from the public on the occasion in question." *Forbes*, 93 F.3d at 504. The government did not have to sponsor a debate. It did, however. Once the debate for the Third Congressional seat was set, a forum was opened. The subsequent exclusion of the only other qualified candidate by the government violates the First Amendment. The government has neither a compelling interest, nor even a reasonable justification for its exclusion. Petitioner's actions in fact go against the very reason for its existence.

Such governmental approval of some qualified candidates and disfavor of others is a dangerous practice. The Eighth Circuit's holding is not only constitutionally warranted but also healthy for the country.

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[3]Petitioner's other argument was that Mr. Forbes was excluded because he had only raised $9,000. This argument is not rational. In a similar debate for a vacancy on the Second District, the Republican nominee was invited by petitioner despite his raising of only $6,000 and facing a powerful Democratic opponent. (R. 259-60.)

CONCLUSION

Government petitioner intentionally opened a limited public forum for a debate for the Third Congressional District of Arkansas. It opened government facilities to outsiders to engage in free expression concerning the office in question. The Eighth Circuit Court of Appeals correctly determined the governmental exclusion of the only other qualified candidate from the limited public forum for no compelling governmental reason to be in violation of the First Amendment. This holding is consistent with this Court's decisions and public forum analysis.

Petitioner's fear of opening access for "viewers" to contest programming decisions are misplaced. "Viewer" rights are inapposite to the case at bar. The instant case simply involves the issue of whether the government may hold a debate and then exclude a candidate it disfavors.

The decision to sponsor a debate was made solely by petitioner. Once decided, Mr. Forbes, a balloted Independent candidate, came under the umbrella of protection within the state-created forum. His exclusion violated not only the First Amendment but the purpose of public television itself. Candidates for U.S. office should expect equal access and equal treatment by the government. Any other approach would be dangerous to a free society.